DEPARTMENT OF JUSTICE

RECONCILING DIVERGENT ENFORCEMENT POLICIES:

WHERE DO WE GO FROM HERE?

Address by

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Presented at the

Fordham Corporate Law Institute

28th Annual Conference on International Law and Policy

New York, New York

October 25, 2001

Good morning. It is an honor to be here to speak about the internationalization of antitrust enforcement before such an esteemed and distinguished audience. Over the years, the Fordham Corporate Law Institute's annual conference has been a wellspring of insightful analysis and fruitful exchanges of ideas regarding the principles and trends that shape antitrust enforcement policy in the international arena. Fordham is not merely a series of "state-of-the-law" lectures for which attendees can obtain CLE credits. It brings together the leading thinkers and policy-makers in the field for intellectual debate, interplay, and hopefully the generation of insights that will guide future directions. I hope that my comments today can contribute to the Conference's tradition of stimulating informed and productive discussions.

Antitrust law enforcement has existed for over one hundred years now, and over the course of this relatively brief history legal practitioners have been confronted with a variety of challenges regarding the interpretation and enforcement of the antitrust laws. At the turn of the 20th Century we were faced with the fundamental difficulty of interpreting the Sherman Act — because it could not possibly mean what it said — and with that came the development of the Rule of Reason and the *per se* rule of illegality for certain arrangements. In the 1950's we were confronted with the task of making sense of the Clayton Act and its implications for merger enforcement. With the 1960's came the Great Structural Age of antitrust law, followed by the introduction of economic rigor into antitrust analysis in the 1970's and 1980's. As the 20th Century came to end we saw the dawn of the so-called "New Economy," with many questioning the proper role of antitrust enforcement in this "better, faster, high-tech" world.

Antitrust lawyers continue to grapple with many of these issues, but this morning I would like to focus upon what I perceive to be one of the most significant challenges confronting

practitioners today — multi-jurisdictional enforcement in an increasingly global economy.

Globalization and Increased Cooperation

In recent years we have seen an explosive growth in the number of countries with antitrust laws and agencies. This growth reflects the growing global recognition that competition, not regulation, produces the most efficient market outcomes for the benefit of producers and consumers alike. The line between antitrust enforcement and economic regulation, however, sometimes can become blurry. One must always be careful to distinguish between seemingly benevolent attempts to create competitive outcomes and competition itself. For example, it might be possible for a market regulator to intervene to the benefit of certain competitors, so as to minimize advantages held by a stronger, more efficient firm. That action might preserve competition in some rough sense, but it would not necessarily produce the most efficient competitive outcome. The sometimes blurry line between antitrust enforcement and economic regulation leaves considerable room for interpretation in the formation of competition law doctrine and in the exercise of appropriate prosecutorial discretion. Thus, jurisdictions with facially similar competition laws can have significantly divergent policies and reach different conclusions, depending upon how each agency interprets its mandate to protect competition. If these areas of divergence overtake our zone of commonality, multi-jurisdictional competition law enforcement can frustrate, not

facilitate, free trade flows, and undermine the very goals competition law seeks to achieve.

The proliferation of antitrust enforcement regimes and the attendant risk of divergent outcomes has made cooperation among the world's antitrust agencies an absolute necessity. One of my predecessors and mentors, Jim Rill, was the first U.S. Assistant Attorney General to recognize the greatly increasing need for consultation, cooperation and coordination among the world's antitrust enforcement agencies. Jim Rill executed a broad international agenda, the centerpiece of which was the landmark cooperation agreement between the European Union (E.U.) and the United States. That agreement set us upon a course of cooperation that has aided our enforcement efforts, fostered policy convergence and minimized the risk of conflicts. Under the agreement, we engage in regular policy and case specific consultations, conduct cross-agency training programs and render enforcement assistance wherever possible. In recently marking the 10th anniversary of this agreement, Commissioner Monti, Chairman Muris and I met to reflect upon our successes of the past ten years and discuss the ways in which we can improve upon the gains already made. We agreed that we have made excellent progress on a number of fronts. Looking to the future, we also agreed to develop a work plan for our merger policy task force that will facilitate continuing staff consultation on matters of enforcement policy and investigational technique.

Our strong relations and cooperative efforts extend beyond the E.U. competition authorities. This past summer I had the good fortune of being able to meet with Patricia Hewitt, the United Kingdom's Minister for Trade and Industry, during which time we discussed the prospects for broad-based competition law reform in the U.K., including the possibility of criminal penalties for hardcore cartel activity. The United States likewise has enjoyed good relations with our counterparts in Germany, Japan, France, and Canada. I

have had the pleasure of working with my Canadian counterpart Konrad von Finckenstein over the past few months towards developing a more concrete framework for the Global Competition Network, a new multilateral effort that is designed to achieve greater substantive and procedural convergence. Without going down the complete list of countries, it suffices to say that the United States has enjoyed good relations with a number of states, and we look forward to expanding the breadth and depth of our relationships.

When Cooperation is Not Enough

Cooperative efforts and good intentions, however, are sometimes not enough. The events of recent weeks have highlighted the difference of opinion between the U.S. and E.U. over the application of the so-called portfolio effects theory to mergers among firms producing non-competing, complementary products. This difference — as most recently reflected in the *GE/Honeywell* transaction — demonstrates that close cooperation and goodwill between antitrust agencies do not guarantee consistent results in individual cases. But our differences over the *GE/Honeywell* transaction are an indication of both how far we have come and how far we have to go.

Consider how a glaring divergence of this magnitude might have been received in the not too distant past. This is not a trade dispute. No one believes the E.U. opposed the transaction to favor national interests. A chorus of international competitors of the merging parties, including a number of prominent U.S. companies, were the most vocal complainants. Nor was this a failure of cooperation. In fact, it would be hard to imagine how we could have cooperated more closely. Rather, it is a simple, but rather fundamental,

doctrinal disagreement over the economic purposes and scope of antitrust enforcement. What led the U.S. to clear the transaction — the prospect that it would make the combined firm a more effective competitor — was the very reason the E.U. opposed it. The E.U. believed that a more effective GE would discourage its rivals, prompting disinvestment or exit from the market. In sum, we appear to disagree over the meaning of competition. Nevertheless, we continue to cooperate, consult and discuss the important issues that bear upon our work.

We raise the portfolio effects issue in this and other policy fora because of its centrality to merger policy, and because divergence between the world's antitrust regimes on an issue this fundamental could undermine the growing consensus favoring competition over regulation. The potential economic consequences of antitrust law meaning one thing in one jurisdiction and something extremely different in another are enormous. There is, however, no direct means of resolving a policy disagreement of this nature between sovereigns. The various antitrust regimes around the world develop their enforcement policies and standards independently, informed by the legal and economic scholarship of the day they find most persuasive. We, therefore, encourage the utmost scholarly focus on the question of portfolio effects, and welcome the chance to discuss the legal and policy issues implicated by this theory at every available opportunity. We in the U.S. had an unfortunate interlude with this theory in the 1960's and hope to share our learning with others. Based upon the old axiom that "sunlight is the best disinfectant," we believe that open discussion among competition authorities and other interested parties will help to forge a consensus that will place us back on the path toward substantive convergence in this particular area. Extrapolating from the fitting words of Oliver Wendell Holmes, we are

prepared to test our views on portfolio effects in the marketplace of ideas. The fact that competition authorities around the world can share perspectives and exchange ideas is a testament to the progress we have made up to this point, and our determination to progress in the future.

Implications for the Future

The *GE/Honeywell* experience highlights the importance of our work in promoting substantive and procedural convergence among the world's antitrust enforcement regimes. This work must be conducted on multiple fronts: through bilateral consultations and arrangements, participation in multilateral policy organizations, direct assistance to emerging competition authorities, competition advocacy, and public education, among others. We believe that a great deal of excellent work is done by governments through international organizations such as the OECD, which provide an excellent venue for debating competition policy issues among a number of nations. We also applaud the work performed by national and international bar associations to advance scholarship in the field. We welcome commentary from the academic community. And we are wise to consider carefully the perspectives offered by business organizations and individual opinion leaders within the global business community.

With all that has been done to stimulate constructive dialogue in this area, the time has come to take the next step -- to move from discussion to action. To that end, the

Antitrust Division strongly supports the Global Competition Network ("GCN"), a multilateral effort to develop and make progress on a specific convergence agenda. When the idea of the GCN first began to germinate, we took into account recommendations such as those set forth in the ICPAC report, and considered carefully how it might fit into the web of international organizations that already focus on competition law convergence. Ultimately, we determined that it was vital for GCN to complement, not displace, other international efforts. Our concept was a project-specific framework that would be distinct from more general international economic organizations, and would be an inclusive, consensus-building effort that would draw upon the resources and efforts of public agencies as well as the private sector.

Over the past several months, FTC Chairman Muris and I have had the distinct pleasure of working closing with our counterparts in other agencies, particularly Commissioner Mario Monti and Alex Schaub of the EU and Konrad von Finckenstein of Canada. Those discussions have produced what appears to be a very clear consensus on what the GCN should be and how it should function.

From the U.S. perspective, the GCN should be a results-oriented network for antitrust agencies from developed and developing countries to formulate and develop consensus positions on specific proposals for procedural and substantive convergence in antitrust enforcement. The GCN's scope should not include trade issues, nor should it encompass non-antitrust issues that could reasonably be included under the rubric of "competition policy." It should be all antitrust, all the time. Such a sustained and concentrated multilateral effort such as the GCN is vital to achieving greater substantive as

well as procedural convergence.

We hope that the GCN meetings will provide a structured dialogue that will focus on two or three projects at a time. Inaugural projects might include the merger control process in the multi-jurisdictional context and competition advocacy. A steering committee initially should identify projects and devise work plans, which should be submitted for approval to the GCN as a whole. These work plans should include timetables, sources of information to be consulted or developed, and desired work product, such as recommendations on "best practices" in a particular area. Designated projects could be completed in various ways, including holding hearings or creating working groups or task forces for selected projects. The working groups should carry out the assigned project and then submit reports and recommendations to the GCN for discussion and approval, modification, or disapproval.

In my view, the GCN's general approach to issues should be as practical as possible, and should avoid abstract discussions that are unlikely to lead to improvements in the practice of antitrust enforcement. Where the GCN reaches consensus on particular recommendations, it should be left to governments to implement them voluntarily through bilateral or multilateral arrangements. In no case will the GCN be a formal rulemaking organization.

The private sector should play an important advisory role in the GCN. I believe that businesspeople, members of the private bar, economists, academics, and representatives of other international organizations will welcome the opportunity to help the GCN to identify projects, participate in GCN information-gathering exercises, and share their views on how GCN projects should proceed.

We do not anticipate that broad policy issues, such as portfolio effects theory, will be an initial topic on the GCN's agenda. Rather, we would hope that the GCN will tackle more practical issues for which concrete solutions might be proposed. On a broader level, we are hopeful that the GCN can help competition authorities build upon a successful record of cooperation and coordination and achieve greater understanding and agreement with respect to those areas where there continue to be areas of divergence. Just as we hope to be able to share the benefits of our own experience with and analysis of portfolio effects, there may be issues where we can likewise benefit from learning about the experiences of other enforcement agencies. As I have stated throughout my comments this morning, we believe it is vital that competition authorities engage one another and the public in a constructive and sustained dialogue regarding our respective policies. It is primarily through such forms of engagement that we have been able to realize greater substantive convergence and conflict avoidance, and these efforts should continue in a vigorous fashion.